

## Nutrients/Water Quality Standards: Federal Appellate Court Addresses Challenge to Montana Variance



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The Ninth Circuit Court of Appeals ("Ninth Circuit") addressed in an October 6th Opinion an issue arising out of the United States Environmental Protection Agency's ("EPA") approval of a Montana water quality standard ("WQS") variance. See *Upper Missouri Waterkeeper v. U.S. Environmental Protection Agency, et al.*

The variance relates to the discharge of the nutrients phosphorus and nitrogen.

Section 303 of the Clean Water Act requires that each state develop water quality standards ("WQS") for jurisdictional waters of the United States within their borders.

A WQS consists of three parts:

- Designated uses of a waterbody
- The water quality criteria that are necessary to protect existing uses and attain the beneficial uses designated by the state
- Anti-degradation statement or policy to protect existing uses in high quality water

A water quality variance is a temporary change in a state's water quality standard for a specific pollutant and its relevant water quality criteria. It allows, in prescribed circumstances, a deviation from meeting a water quality-based effluent limit for a particular discharger.

Regulations promulgated by EPA pursuant to the Clean Water Act afford the flexibility in some circumstances to adopt such a variance. Nevertheless, EPA has ultimate approval of variances proposed by a particular state.

EPA has described appropriate WQS variances as being time limited and striking:

... a balance between providing states, territories, authorized tribes and dischargers the time and flexibility to make incremental water quality improvements reflecting the best that can be achieved in a given time period, with accountability measures to assure the public that progress will occur.

The role of nitrogen and phosphorus in water pollution has been a subject of serious consideration by EPA and the states for a number of years. Excessive nutrients can stimulate excess growth of algae. This can impair the recreational use of lakes or reservoirs and also increase the organic matter which (when decomposed) can depress dissolved oxygen concentrations harming aquatic life.

Excessive nutrients can also stimulate nuisance algae. This can produce cyanotoxins.

As a result, there has been significant pressure to address point source dischargers of such pollutants.

Montana adopted WQS standards addressing nitrogen and phosphorus in wadeable streams in 2014. It assigned designated uses for wadeable streams that included support of aquatic life and recreation. Further, to protect such uses, it specified the maximum permissible concentrations of nitrogen and phosphorus. EPA subsequently approved these WQS.

In 2017 Montana sought approval from EPA for a WQS variance. The variance would address 36 municipal wastewater treatment facilities (“WWTFs”). It would allow those facilities to discharge more nitrogen and phosphorus into wadeable streams than would be allowed under the 2015 Montana WQS.

In support of its submission to EPA Montana argued that the WWTFs could only meet the nutrient WQS if they installed reverse osmosis technology. The state contended that the cost of adopting this technology would result in substantial and widespread economic and social impact on the surrounding communities.

EPA subsequently approved the requested variance. It agreed with the state’s assessment that:

- Implementing reverse osmosis technology would be necessary to attain compliance with the base WQS; and
- The cost of implementing such technology would result in substantial and wide economic and social impact on communities served by the 36 municipal WWTFs

Upper Missouri Waterkeeper (“Waterkeeper”) filed an action in the United States District Court (“Court”) arguing that EPA’s approval of the variance violated the Administrative Procedure Act (“APA”) because it was not in accordance with the law. The organization argued that the Clean Water Act prohibits EPA from considering compliance costs when granting variance requests.

The Court granted partial vacatur of EPA’s approval of the variance.

The Ninth Circuit first considered Waterkeeper’s argument that the Clean Water Act precluded EPA from taking compliance costs into account when approving variance requests. The Chevron analysis was applied.

As to step one, Congress was held to have not directly spoken to the question at issue. In other words, Section 1313(c)(2)(A) of the Clean Water Act was not deemed to have addressed whether EPA may consider compliance costs when approving a state’s WQS or (by extension) when approving a state’s variance request.

In assessing step two, the Ninth Circuit held that EPA reasonably construed this section of the Clean Water Act as permitting it to consider compliance costs when approving WQS and various requests.

EPA had challenged the Court’s partial vacatur of its decision approving Montana’s variance.

The Court had held that the variance’s terms of up to 17 years was invalid. The alleged invalidity was because of its failure to require compliance with the highest attainable condition at the outset of the term. Further, it did not require compliance with Montana’s base WQS by the end of the term.

The Ninth Circuit held that EPA’s Clean Water Act variance regulations unambiguously provided that compliance with the highest attainable condition was not required at the outset. It stated the Court did not identify any provision in the referenced regulations that supported its view that the variance must require compliance with the base WQS by the end of the variance’s term.

A number of features in EPA’s regulations whose intent was to ensure that dischargers in waterbodies subject to variances continued to improve water quality were identified. This regulatory framework was held consistent with the goals of the Clean Water Act, which as reasonably construed by EPA, included supporting aquatic life and recreation uses whenever attainable.

The Ninth Circuit remanded to the United States District Court with instructions to deny Waterkeeper’s Motion for Summary Judgment and to grant to EPA and intervenor-defendant’s Motion for Summary Judgment in full.

A copy of the Opinion can be downloaded [here](#).